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In The
Supreme Court of the United States

ORA MYRTLE RANSFORD and PATRICIA L. LEE
(as successor-in-interest to ALVA RANSFORD, decedent),

Petitioners,

v.

GRIFFIN WHEEL COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a conflict among the states and federal circuit courts on the important question of the scope of federal pre-emption of state laws regarding railroad safety. Two state supreme courts (Pennsylvania and Washington) hold, consistent with this Court's fundamental pre-emption jurisprudence, that railroad-safety pre-emption arises only from Congress's narrow, express pre-emption provision (49 U.S.C. section 20106) in its single, comprehensive statutory scheme for railroad safety (49 U.S.C. sections 20101-21311). But the California opinion below (like Alabama and two federal circuits) holds, contrary to this Court's jurisprudence, that state railroad-safety laws (including tort actions) are pre-empted not only narrowly by Congress's express provision but also much more broadly by *implication* from two of Congress's earlier acts that once governed only portions of railroad-safety law – until they were subsumed into the current, comprehensive scheme. This application of broad field pre-emption is harming not only railroad-injury victims but also the railroads themselves, who alone can be liable under the Federal Employers' Liability Act ("FELA") and thus are being saddled with all liability for railroad injuries, unable to seek indemnity from culpable defective-product manufacturers due to pre-emption based immunity.

QUESTION PRESENTED – Continued

We seek this Court's review to resolve these conflicts by answering this important federal question:

1. Did Congress, in enacting for all areas of "railroad safety" a single, comprehensive statutory scheme with a narrow express pre-emption provision specifically designed to involve the states in maintaining railroad safety, necessarily obviate any former interpretation of Congress's earlier, piecemeal railroad-safety acts as implying an additional, much broader intent to pre-empt all state regulation?

PARTIES TO THE PROCEEDINGS

Petitioners are Ora Myrtle Ransford and Patricia L. Lee, as successor-in-interest to Alva Ransford, decedent.*

The only respondent is Griffin Wheel Company, Inc., which is a wholly-owned subsidiary of Amsted Industries Incorporated.

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* Alva Ransford, plaintiff and petitioner below, died on May 30, 2009. After his death, he was replaced as a plaintiff in the trial court by his daughter, Patricia L. Lee, as his successor-in-interest.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ora Myrtle Ransford and Patricia L. Lee (as successor-in-interest to Alva Ransford, decedent) respectfully request that this Court grant this petition for a writ of certiorari to review the opinion of the California Court of Appeal, as to which the California Supreme Court denied discretionary review.

OPINIONS BELOW

In August 2007, petitioners commenced this action in the Superior Court of California, City and County of San Francisco, alleging plaintiff Alva Ransford's exposure to asbestos released during repairs of railroad cars from train products manufactured by respondent Griffin Wheel Company, Inc. ("Griffin").

On February 29, 2008, the trial court entered an order granting summary judgment to Griffin on the ground that petitioners' state tort claims are barred by pre-emption arising from the federal "Safety Appliances Acts" ("SAA") and "Locomotive Boiler Inspection Act" ("BIA").[1] This order, which is not

[1] As discussed fully in the Argument section below, the SAA and BIA, once codified at 45 U.S.C. sections 1-16 and 22-34, respectively, no longer exist as independent acts. In 1994, Congress repealed those former acts' provisions, incorporating a few of the provisions into Congress's comprehensive statutory scheme for railroad safety at 49 U.S.C. sections 20301 et seq. (SAA) and 20701 *et seq.* (BIA) and discarding the rest.

published and contains no official or unofficial citation, is reprinted in the Petitioners' Appendix ("App.") at 15-16. On March 12, 2008, the trial court entered judgment for Griffin. App. 17-18.

On July 9, 2009, the California Court of Appeal, First Appellate District, Division Two, affirmed the summary judgment on the ground that petitioners' claims are pre-empted by the SAA and BIA. The appellate court's opinion, which is not published but is unofficially reported at 2009 WL 1994740, is reprinted at App. 1-14.

On July 30, 2009, the California appellate court denied petitioners' petition for rehearing in that court. This order, which is not officially or unofficially reported, is reprinted at App. 19.

On September 23, 2009, the California Supreme Court denied petitioners' petition for discretionary review of the California appellate court's opinion. This order denying review, which is not published or officially or unofficially reported, is reprinted at App. 20.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the California Court of Appeal, filed July 9, 2009, as to which rehearing was denied on July 30, 2009, and as to which discretionary review by the California Supreme Court was denied on September 23, 2009.

This Court has jurisdiction under 28 U.S.C. section 1257 because the challenged California opinion raises a federal question regarding the preemptive effect of Congress' railroad-safety statutes (49 U.S.C. §§ 20101-21311).

STATUTES INVOLVED IN THE CASE

This petition presents the question of preemption arising from Congress's statutory scheme governing railroad safety, codified at 49 U.S.C. sections 20101-21311. The relevant provisions (including the few surviving provisions from the former SAA and BIA) are lengthy and are thus reprinted in the Appendix at App. 21-32.

But two pivotal provisions warrant reproduction here:

49 U.S.C. § 20101 – "Purpose":

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

49 U.S.C. § 20106 – "Preemption":

(a) *National uniformity of regulation.*

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) *Clarification regarding State law causes of action.*

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject

matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) *Jurisdiction.*

Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

STATEMENT OF THE CASE

Introduction

This case raises the federal question of the preemptive effect of Congress's comprehensive statutory scheme governing railroad safety – now codified at 49 U.S.C. sections 20101-21311.

At the turn of the 20th Century, as railroad use in industrial America flourished, Congress enacted piecemeal legislation addressing *some* areas of railroad

safety. The SAA, a series of measures enacted from 1893 to 1910 and formerly codified at 45 U.S.C. sections 1-16, addressed regulation of railcar safety devices. And the BIA, several measures enacted in 1911 and formerly codified at 45 U.S.C. sections 22-34, addressed regulation of locomotives and their parts. Neither of these acts contained any express pre-emption provision or language. But this Court held that the acts were then so broad that they evidenced Congress's "implied" intent to occupy the respective "fields" of train "safety appliances" (SAA) and "locomotive safety" (BIA) and thus to pre-empt any state regulation in those areas. *See Southern Ry. Co. v. R.R. Comm., Indiana*, 236 U.S. 439, 35 S.Ct. 304 (1915) (SAA); *Napier v. Atlantic Coast Line*, 272 U.S. 605, 47 S.Ct. 207 (1926) (BIA). Over the following decades, courts construed this implied "field" pre-emption under the SAA and BIA to pre-empt not only state regulations in the affected areas but also state tort claims touching on those areas.

By the end of the 1960s, however, Congress determined that the earlier acts were not achieving railroad safety and thus in 1970 enacted the Federal Railroad Safety Act ("FRSA") as a comprehensive scheme that, according to its express "purpose," was intended to govern "safety in *every area* of railroad operations." *See* 49 U.S.C. § 20101 (App. 21) (emphasis added).

And this time, Congress did not remain silent on pre-emption. Instead, Congress included in the FRSA an express provision (titled "Pre-emption") declaring

its pre-emptive intent that, as to *all* laws "related to railroad safety," *no* pre-emption exists unless and until a federal regulation is enacted to govern the same "subject matter":

> A State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106, subd. (a)(2) (App. 21-22).

Although the earlier SAA and BIA had addressed discrete sub-areas of railroad safety (safety appliances and locomotive safety), Congress in 1970 did not initially recodify the former acts or subsume them into the new, comprehensive FRSA scheme. But in 1994, Congress did recodify the FRSA, SAA, BIA, and all federal laws related to railroad safety into one single statutory "Safety" scheme: United States Code, Title 49 ("Transportation"), Subtitle V ("Rail Programs"), Part A ("Safety"). *See* 49 U.S.C. § 20101 *et seq.* This scheme includes a handful of the former provisions of the SAA (now §§ 20301-20306, App. 23-28) and BIA (now §§ 20701-20703; App. 28-32) – but Congress discarded the rest of those former acts' provisions.

Most important, Congress placed in the "General" provisions of the new comprehensive "Safety" scheme its express pre-emption provision (from the FRSA) declaring that, as to "railroad safety" laws,

state action is pre-empted only when a federal regulation is enacted on the specific subject matter. *See* 49 U.S.C. § 20106.

It is against this backdrop that the present controversy lies.

Federal Question Raised at All Levels Below

Decedent Alva Ransford, plaintiff and petitioner below, who for 39 years repaired and replaced asbestos-containing brakes on railroad locomotives and cars, died on May 30, 2009 of mesothelioma caused by exposure to asbestos.

In August 2007, Alva and his wife Ora Ransford filed suit in the California Superior Court, City and County of San Francisco, against respondent Griffin Wheel Company, Inc. (Griffin), alleging exposure to asbestos released during Ransford's repair and replacement of train brake shoes manufactured by Griffin. App. 1-2.

Griffin moved for summary judgment on the sole asserted ground that petitioners' tort claims are barred by "field" pre-emption supposedly still arising from the SAA and BIA. *See* Appellant's Appendix on appeal ("AA") at 42-50. Griffin did not assert that petitioners' claims are also barred by Congress's express pre-emption provision for railroad-safety laws (49 U.S.C. section 20106). Instead, Griffin conceded

that the express provision does *not* pre-empt the claims[2] but argued that field pre-emption under the "distinct" SAA and BIA continues to exist as an alternative, simultaneous pre-emption scheme that bars petitioners' claims. AA at 50:9-26.

Petitioners immediately asserted in the trial court the federal question posed in this petition, arguing that any interpretation of the former SAA and BIA as *implying* Congress's intent to pre-empt any state laws touching on the "fields" of safety appliances and locomotive safety is no longer tenable because Congress has since *expressed* a contrary intent for all railroad-safety areas. AA at 493-496. Accordingly, petitioners argued, Congress's "express pre-emption provision govern[s] all laws on any rail-safety subject" – so that no alternative implied "field" pre-emption exists. AA at 496:8-11.

The trial court granted summary judgment, ruling that "pursuant [to] the [BIA] and [SAA], the plaintiffs['] causes of action are pre-empted" and entering judgment for Griffin. App. 16-18.

Petitioners appealed to the California Court of Appeal, arguing that the pre-emption-based summary judgment should be reversed because "[i]mplied BIA

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[2] It is undisputed in this action that no federal regulation covers the "subject matter" of asbestos in train parts, so that Congress's express pre-emption provision (49 U.S.C. section 20106) does not pre-empt petitioners' claims.

and SAA 'field' pre-emption *no longer exists* – express FRSA pre-emption governs (and does not bar plaintiffs' claims)." Appellants' Opening Brief on appeal, California Court of Appeal No. A121620 ("AOB") at 9; *see* AOB at 1-2, 9-32.

The California appellate court, in an opinion filed July 9, 2009, affirmed the summary judgment on the ground that petitioners' "causes of action are pre-empted" by SAA and BIA field pre-emption. App. 2. The appellate court rested its decision on two earlier decisions of the California Supreme Court that had applied SAA and BIA field pre-emption after Congress had enacted its express pre-emption provision. App. 2-10 (*citing Carrillo v. ACF Indus., Inc.*, 980 P.2d 386, 20 Cal.4th 1158 (Cal. 1999), *cert. denied*, 528 U.S. 1077, 120 S.Ct. 793 (2000) ("*Carrillo*"); *Scheiding v. General Motors Co.*, 993 P.2d 996, 22 Cal.4th 471 (Cal. 2000), *cert. denied*, 531 U.S. 958, 121 S.Ct. 383 (2000) ("*Scheiding*")). Despite petitioners' showing that the *Carrillo* and *Scheiding* courts had not even been presented with the question of whether former SAA and BIA field pre-emption was obviated by Congress's express pre-emption provision[3] (*see* AOB at 25-27), the California appellate

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[3] Because neither *Carrillo* nor *Scheiding* involved the question of the effect of Congress's express pre-emption provision on the former interpretation of field pre-emption, that issue was not raised in those cases' certiorari petitions that this Court denied. *See* 1999 WL 33632488 (*Carrillo* cert. petition); 2000 WL 33999304 (*Scheiding* cert. petition).

court ruled that *Carrillo* and *Scheiding* control in California – and thus held that it is "clear beyond any reasonable doubt that both the SAA and the BIA continue to have an existence and potency that is completely independent of the FRSA" and its express pre-emption provision. App. 8.

Petitioners petitioned the appellate court for a rehearing, but the petition was denied. App. 19.

Petitioners then petitioned the California Supreme Court for discretionary review of the appellate court's opinion, again arguing specifically that former SAA and BIA field pre-emption "no longer exist" because "Congress's express intent" is manifestly that "state regulations on all areas of railroad safety are not pre-empted unless and until a federal regulation is adopted on the same subject matter." Appellants' Petition for Review, California Supreme Court No. S175613 ("Pet. Rev.") at 12; *see* Pet. Rev. at 1-17.

On September 23, 2009, the California Supreme Court summarily denied petitioners' petition for review. App. 20.

ARGUMENT: REASONS TO GRANT CERTIORARI

This case presents three compelling grounds for review under this Court's Rule 10. The California

opinion below decides an "important question of federal law": the nationwide pre-emptive effect of Congress's statutory scheme designed to "promote safety in every area of railroad operations." *See* 49 U.S.C. § 20101 *et seq.*; *see also Wyeth v. Levine*, ___ U.S. ___, 129 S.Ct. 1187 (2009) (certiorari granted based on "importance of the pre-emption issue"). California's answer to this important federal question raises three Rule 10 grounds for review:

1. *Conflict with decisions of this Court*: California's holding that the former SAA and BIA continue to "imply" a broad pre-emptive intent far beyond Congress's express narrow intent "conflicts with relevant decisions of this Court" that declare repeatedly that no federal pre-emption exists unless it is "the clear and manifest purpose of Congress" (*e.g.*, *Wyeth*, 129 S.Ct. at 1194-1195) – and that the "best evidence of Congress's pre-emptive intent" is "necessarily" found in the "plain wording" of Congress's "express pre-emption clause" (*e.g.*, *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732 (1993)). *See* Supreme Court Rule ("Rule") 10(c); Part I below.

2. *Conflict among states and circuits*: California here, along with two federal circuit courts of appeals and the Alabama Supreme Court, has decided the "important question" of railroad-safety pre-emption "in a way that conflicts with" the highest courts of Pennsylvania and Washington, which have correctly recognized that Congress expressly declared its pre-emptive intent for railroad-safety laws in its express

pre-emption provision (49 U.S.C. section 20106), so that any interpretation of the former SAA and BIA as implying much broader "field" pre-emption conflicts with Congress's express intent and is not valid. *See* Rule 10(b); Part II below.

3. *Important federal question that should be settled*: The important federal question of railroad-safety pre-emption "has not been, but should be, settled by this Court" because the California approach not only violates Congress's intent but also (1) undermines Congress's purpose of promoting railroad safety, (2) unfairly saddles the railroads with *all* liability for injuries to their employees, even injuries caused wholly or substantially by a third-party product manufacturer, and (3) leaves many victims of railroad-related injuries without *any* recourse against any culpable party. *See* Rule 10(c); Part III below.

I. CONFLICT WITH THIS COURT'S DECISIONS: THE OPINION BELOW FINDS PRE-EMPTION THAT IS FLATLY CONTRARY TO CONGRESS'S EXPRESS INTENT.

The California opinion below should be reviewed on certiorari because its decision on the important federal question of railroad-safety pre-emption violates this Court's repeated command that pre-emption does not exist unless it is Congress's "clear and manifest purpose" – and here, to the contrary,

Congress's manifest purpose is that no pre-emption exists.

A. The "Ultimate Touchstone" of Pre-Emption is Congress's Intent – And Any Express Pre-Emption Provision Controls.

Federal pre-emption "fundamentally is a question of congressional intent." *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270 (1990). Thus, as this Court recently iterated in *Wyeth v. Levine*, pre-emption analysis must always "be guided by two cornerstones of [this Court's] pre-emption jurisprudence":

1. The "purpose of Congress is the ultimate touchstone in every pre-emption case"; and

2. Pre-emption analysis always "start[s] with the assumption" that no pre-emption exists "unless that [is] the clear and manifest purpose of Congress." *Wyeth*, 129 S.Ct. at 1194-1195 (*quoting Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240 (1996)).

This Court has consistently recognized three types of pre-emption: (1) express pre-emption (stated in Congress's statutory language); (2) implied "field" pre-emption (gleaned from Congress's implied intent to "occupy" the relevant "field" of law); and (3) actual "conflict" pre-emption (found when state law conflicts with federal law). *See English*, 496 U.S. at 78-79.

When Congress has stated its pre-emptive intent expressly, that intent controls. As this Court declared in *English*, "when Congress has made its [pre-emptive] intent known through explicit statutory language, the courts' task is an easy one" (*English*, 496 U.S. at 79) – the express pre-emption provision controls. Likewise, this Court declared in *CSX Transportation* that if the statute at issue "contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent." *CSX Transportation*, 507 U.S. at 664.

Thus, courts can properly look for implied "field" pre-emption only when Congress has *not* stated its pre-emptive intent expressly. As this Court held in *English*, in summarizing the three types of pre-emption, "field" pre-emption may be inferred from congressional intent to "occupy" the field only "*in the absence of explicit statutory language.*" *English*, 496 U.S. at 79 (emphasis added); *accord Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608 (1992) (field pre-emption may be inferred "[i]n the *absence of* any express congressional command").

Finally, permeating this pre-emption analysis is the strong "presumption *against* pre-emption," a presumption that applies whether the claimed pre-emption is express, field, or conflict pre-emption. *See Wyeth*, 129 S.Ct. at 1194-1195 and n.3 ("this Court has long held" that the "presumption against pre-emption" applies to implied pre-emption); *Altria*

Group, Inc. v. Good, __ U.S. __, 129 S.Ct. 538 (2008) (presumption applies to "questions of express or implied pre-emption").

B. The Conflict: California Ignores Congress's Narrow Express Pre-Emption Clause That Encourages State Participation To Apply Implied Field Pre-Emption That Eliminates State Participation.

The California opinion below conflicts with this Court's pre-emption jurisprudence by deriving Congress's pre-emptive intent for railroad-safety laws not from Congress's narrow express pre-emption provision in its modern, comprehensive statutory scheme (as this Court requires) but instead by inferring a much broader pre-emptive intent from Congress's earlier acts (the SAA and BIA) that once partially governed railroad safety but that have since been subsumed within the current, comprehensive scheme.

1. Congress's express provision for narrow pre-emption governs, obviating any interpretation of Congress's prior acts as implying broader field pre-emption.

As detailed in the Statement of the Case above, Congress first addressed railroad safety a century ago with a piecemeal statutory scheme that included the SAA (regulating train safety appliances, formerly 45

U.S.C. sections 1-16) and the BIA (regulating locomotive equipment, formerly 45 U.S.C. sections 22-34). Because those acts lacked any express pre-emption language showing Congress's intent, this Court interpreted the acts as evidencing Congress's intent to "occupy" the respective fields of safety appliances and locomotives – and thus as impliedly pre-empting any state regulation of those fields. *See Southern Ry.*, 236 U.S. 439; *Napier*, 272 U.S. 605.

When those piecemeal statutes were all that governed railroad safety, interpreting the SAA and BIA as implying field pre-emption was proper and sensical. The statutes lacked any express pre-emption language, so the courts were free to interpret them as implying Congress's intent to occupy the respective railroad-safety fields of safety appliances and locomotives and thus to pre-empt broadly any state regulation in those areas.

But the propriety of that interpretation was obviated when Congress *expressed* a different pre-emptive intent for *all areas* of "railroad safety." *See* 49 U.S.C. § 20106 (App. 21-23). That express pre-emption clause was enacted as part of Congress's comprehensive statutory scheme to assure "safety in *every area* of railroad operations." *See* 49 U.S.C. § 20101 (App. 21) (emphasis added). And the pre-emption provision declares unequivocally Congress's narrow intent that no state law or regulation "related to railroad safety" is pre-empted *unless* a specific federal regulation governs the exact subject matter of the state law:

> A State may adopt or continue in force a law, regulation, or order related to *railroad safety* . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106, subd. (a)(2) (App. 21-22) (emphasis added).

Congress's intent cannot be stated more clearly: the express pre-emption provision applies to *every* law or regulation "related to railroad safety" – thus necessarily including the sub-areas of "safety appliance" safety and "locomotive" safety once governed only by the former SAA and BIA. Once Congress *stated* this intent expressly, there no longer existed any reason for courts to glean an implied pre-emptive intent from Congress's earlier acts – let alone a completely different intent.

Moreover, even if Congress's express pre-emption provision could somehow be said to be ambiguous as to whether all laws "related to railroad safety" includes those laws regulating train safety appliances and locomotives (the former purview of the SAA and BIA), the presumption *against* pre-emption requires the resolution of any such ambiguity against pre-emption. *See Altria*, 129 S.Ct. at 543 (*quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S.Ct. 1788 (2005)) ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'").

2. Legislative history confirms Congress's intent to apply its narrow pre-emption provision to laws in all areas of railroad safety.

That Congress intends its express pre-emption provision to apply to *all* railroad-safety laws (thus including laws affecting safety appliances and locomotives) is corroborated by legislative history. In June 1970, just before Congress enacted its comprehensive railroad-safety scheme (as the FRSA), a House Committee recommended passage in a lengthy report, which is published at 1970 United States Code Cong. and Admin. News ("U.S.C.C.A.N.") at 4104 ("House Rep.").[4] This House Report shows Congress's specific intent to consolidate and supplement the existing, piecemeal railroad-safety acts (including the SAA and BIA), creating new "broadscale federal legislation" to effect a "substantial upgrading" of "railroad safety." *Id.* at 4104, 4105. The report expressly acknowledged that prior "legislation," including the SAA and BIA, had previously addressed only "certain phases of railroad safety." *Id.* at 4105. But the new scheme followed the "unanimous recommendation" that "broad federal regulatory authority over *all areas of railroad safety* be enacted." *Id.* at 4108. Thus, the scheme covered all areas of railroad safety: the "most comprehensive rail safety legislation ever reported to the Congress." *Id.* at 4106.

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[4] This House report is part of the record below. *See* AA 836-862.

Moreover, the legislative history reflects Congress's specific intent to *involve the states* in promoting rail safety *until* a governing federal regulation exists. The House Report noted that the FRSA was enacted because the "time is now here for broadscale federal legislation *with provisions for active state participation* to assure a much higher degree of railroad safety." House Rep. at 4108 (emphasis added); *accord id.* (recommending "administration of the rail safety program . . . through a federal-state partnership"). Indeed, the Report's section titled "The Role of the States in Rail Safety" indicates that Congress intended to replace any earlier "field" pre-emption with the new express pre-emption scheme. The Report noted that "[a]t the present time where the federal government has authority, with respect to rail safety, it pre-empts the field." *Id.* But Congress intended the FRSA to *change* this approach: "With respect to the reported bill [creating the FRSA], the task force recommended that existing state requirements *remain in effect until pre-empted by federal action*." *Id.* (emphasis added). Accordingly, Congress provided that, as to *all* railroad-safety laws, pre-emption applies only upon actual federal regulation:

> The bill as passed by the Senate preserve[s] existing state statutes *until pre-empted*. It also permit[s] the states to regulate in new areas *until pre-empted*.

Id. at 4109 (emphasis added).

In light of this history, it cannot possibly be concluded that Congress, in enacting its comprehensive scheme to partner with the states to promote railroad safety, nevertheless intended to retain former "field" pre-emption that bars any state regulation whether or not a governing federal regulation exists.

To the contrary, Congress's specific intent is to *involve* the states in promoting railroad safety. California's conclusion that Congress also intends simultaneously to *pre-empt* universally all state regulation in the sub-areas of safety appliances and locomotives is simply not tenable.

3. The 1994 Recodification: Congress repealed the former "SAA" and "BIA" and blended some (but not all) of their provisions into Congress's single, comprehensive scheme for railroad safety.

Next, any possible doubt that Congress intends its express pre-emption provision to apply to all railroad-safety laws (including laws regulating safety appliances and locomotives) was removed when Congress in 1994 recodified all of the former rail-safety acts (including the SAA, BIA, and FRSA) into its current, single, comprehensive statutory "Safety" scheme – with Congress's narrow express pre-emption provision applying to the entire scheme.

This 1994 recodification left intact *one* scheme for railroad "Safety": United States Code, Title 49 ("Transportation"), Subtitle V ("Rail Programs"), Part A ("Safety"). *See* 49 U.S.C. § 20101 *et seq.* And that single scheme's "General" provisions include Congress's narrow, express pre-emption provision as to all "railroad safety" laws. *See* 49 U.S.C. § 20106.

Hence, after this recodification, the former piecemeal safety acts – SAA, BIA, and FRSA – no longer exist. Indeed, as part of the 1994 recodification, Congress *repealed* the former "SAA" and "BIA" provisions (*see* former 45 U.S.C. §§ 1-16 and 22-34). And Congress did not move those provisions into the new scheme *in toto*. Instead, Congress kept some of the provisions but discarded the rest: of the former SAA's 16 provisions, just six remain (49 U.S.C. §§ 20301-20306, App. 23-28); and of 13 former BIA provisions, just three remain (49 U.S.C. §§ 20701-20703, App. 28-32).

There is no "SAA" or "BIA" anymore. There is now Congress's single railroad "Safety" scheme, with one governing pre-emption provision that Congress intentionally made quite narrow. No additional, broad field pre-emption can properly be inferred.

Because the California opinion below conflicts with this Court's jurisprudence holding that Congress's pre-emptive intent is found in its express pre-emption provision, certiorari is warranted under Rule 10(c) and should be granted.

II. CONFLICT AMONG THE STATES AND CIRCUITS.

Certiorari is warranted also under Rule 10(b) because this case presents a conflict among the states and circuits.

In addition to California here, two federal circuits and the Alabama Supreme Court have ruled that, despite Congress's enactment of its narrow express pre-emption provision, the former SAA and BIA nevertheless continue to imply an alternative scheme of broad field pre-emption:

- *Ninth Circuit*: "We conclude that the language and structure of the [FRSA] indicate a congressional intent to leave the [BIA] intact, including its preemptive effect." *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983).

- *Sixth Circuit*: "[T]he preemptive effect of the BIA on state regulation of locomotive equipment was not affected or modified by the [FRSA] which was enacted in 1970." *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094, 118 S.Ct. 1560 (1997).

- *Alabama*: "We disagree" that "Congress's enactment of the [FRSA] in 1970 altered the preemptive effect of the [BIA]." *General Motors Corp. v. Kilgore*, 853 So.2d 171, 179 (Ala. 2002).

But two state Supreme Courts (Pennsylvania and Washington) hold to the contrary that Congress's enactment of its express pre-emption provision

governs and obviates any interpretation of the former SAA and BIA as implying broader field pre-emption:

- *Pennsylvania*: The "clear intent of Congress," as "articulated in the [FRSA] of 1970," is "to permit state regulation of railroad safety until pre-empted," thus "mandat[ing] the conclusion that the federal government has not preempted the entire field." * * * "While the broad language of the [BIA] at one time could have been interpreted as reflecting Congressional intent to preempt the entire field of railroad safety, the enactment of [the FRSA's express pre-emption provision] no longer permits that reading." *Norfolk and W. Ry. Co. v. Pennsylvania Pub. Util. Comm.*, 413 A.2d 1037, 1041-1042, 1043 (Pa. 1980).

- *Washington*: "We must conclude that, absent promulgation of federal administrative regulations relating to [locomotive] spark arresters, the [BIA] does not pre-empt the power of individual states to require such devices. This conclusion is supported by section 205 [the express pre-emption provision] of the [FRSA]. . . ." *State v. Chicago, Milw., St. Paul and Pac. RR Co.*, 484 P.2d 1146, 1149 (Wash. 1971), *app. dismissed sub nom. Chicago, Milw., St. Paul and Pac. RR Co. v. Washington*, 404 U.S. 804, 92 S.Ct. 108 (1971).

This Court should grant certiorari to resolve this conflict among the states and circuits on the important question of federal pre-emption of railroad-safety laws.

III. QUESTION TO BE SETTLED: CALIFORNIA'S BROAD HOLDING VIOLATES CONGRESS'S INTENT, UNDERMINES RAILROAD SAFETY, HARMS THE RAILROADS, AND DEPRIVES INJURY VICTIMS OF COMPENSATION.

Finally, certiorari is warranted also because the important federal question of railroad-safety preemption "has not been, but should be, settled by this Court." *See* Rule 10(c).

This important question should be settled by this Court because the holding of California (and Alabama and two circuits) that broad SAA and BIA field preemption still exists (1) rests on flawed analysis that ignores Congress's express pre-emptive intent in favor of supposed legislative-history and policy concerns that do not exist, (2) defeats Congress's legislative purpose by *undermining* railroad safety, (3) unfairly saddles the *railroads* with all liability for injuries to railroad employees, even those injuries caused wholly or substantially by third-party product manufacturers, and (4) in many cases prevents victims of railroad-related injuries from recovering from any culpable party.

A. California ignores Congress's Express Pre-emptive Intent in Favor of Phantom Legislative-History and Policy Concerns.

The holding of California (and of the Sixth and Ninth Circuits and Alabama) that Congress's express pre-emption provision did not affect SAA or BIA field pre-emption rest wholly on the 1982 federal district court opinion in *Consolidated Rail Corp. v. Pennsylvania P.U.C.*, 536 F.Supp. 653 (E.D.Pa. 1982), *summarily aff'd*, 696 F.2d 981 (3d Cir. 1982), *summarily aff'd sub nom. Pennsylvania P.U.C. v. Consolidated Rail Corp.*, 461 U.S. 912 (1983) – a decision that is fundamentally flawed, ignoring Congress's express pre-emptive intent to promote supposed legislative-history and policy concerns.[5]

In *Consolidated Rail*, a railroad in 1982 challenged a Pennsylvania statute requiring locomotives to have "speed recorders and indicators." *Consolidated Rail*, 536 F.Supp. at 654. The railroad asserted both express pre-emption (under Congress's express provision) and implied field pre-emption (under the BIA). *Id.* The district court correctly ruled that Congress's express provision pre-empted the Pennsylvania statute because the "[FRA] has adopted a rule governing speed indicators in locomotives." *Id.* at 657

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[5] *See Marshall*, 720 F.2d at 1153 (Ninth Circuit following *Consolidated Rail*); *Springston*, 130 F.3d at 245 (Sixth Circuit following *Marshall*); *Kilgore*, 853 So.2d at 179 (Alabama following *Consolidated Rail*).

and n.16 (*citing* 49 C.F.R. § 229.117(a)); *see* 49 U.S.C. § 20106 (state laws pre-empted when federal agency enacts regulations on the specific subject matter). But the district court also found implied "field" pre-emption (under the BIA), ruling (unnecessarily) that "Congress did not intend the pre-emption provision of the [FRSA] to modify the total-pre-emptive effect of the [BIA]." *Id.* at 657.

The district court's reasoning for this ruling is erroneous because it ignores Congress's express intent of narrow pre-emption for all laws "related to railroad safety." *See* 49 U.S.C. § 20106. Instead, the court found a contrary intent to continue additionally to apply broad field pre-emption (to locomotive safety laws) based on two stated reasons: (1) "the legislative history of the [FRSA] shows that Congress intended no change to the [BIA]"; and (2) "elimination of the total-pre-emption test for locomotive equipment runs contrary to the purpose of the [FRSA]." *Consolidated Rail*, 536 F.Supp. at 656. This was improper – field pre-emption can properly be found only "in the absence of explicit statutory language." *English*, 496 U.S. at 79; *accord Cipollone*, 505 U.S. at 516.

But even if the district court could properly have ignored Congress's express intent, the court's stated reasons to find continued field pre-emption simply lack merit:

1. *Legislative history*: *Consolidated Rail* asserted that the FRSA's legislative history "shows that Congress intended no change to the [BIA]," citing a

statement in the House Report (discussed above in this petition) that the BIA (and SAA) had "served well," so that Congress in 1970 "chose to continue" them "without change." *See Consolidated Rail*, 536 F.Supp. at 656 (*citing* 1970 U.S.C.C.A.N. at 4105). The *Consolidated Rail* court concluded that this "decisio[n]" by Congress "negate[d] implied modification of any part of the [BIA], including its total occupation of the locomotive-equipment field." *Id.*

But that conclusion fails because any former "field" pre-emption was not a "part of" the BIA (or SAA) – it was a judicial *interpretation* of what Congress, in the absence of any express pre-emption language, had impliedly intended in passing those earlier acts. But when Congress subsequently expressed its intent for pre-emption as to all areas of railroad safety, it negated any need to glean any implied intent. Thus, after Congress stated its express intent in the FRSA, the former interpretation of a different "implied" congressional intent was no longer necessary – or tenable.

Read properly, the cited legislative history reflects that Congress indeed decided (when enacting the FRSA) to leave intact, "without change," the BIA's and SAA's *affirmative* provisions providing regulatory authority over locomotives and safety appliances. Congress did not choose (at that time) to recodify the federal power to enact regulations covering those subject matters. Instead, Congress kept the BIA and SAA provisions intact, providing for continued regulation of the discrete fields they covered.

But Congress, by keeping those regulatory provisions intact, did not also declare that the former *interpretation* of implied field pre-emption was still valid. To the contrary, the same House Report shows that Congress decided that a much less pervasive pre-emption scheme – intentionally *involving* the states and pre-empting state law only when actual federal regulations exist – is the best way to promote railroad safety. *See* House Rep. at 4105 (AA 838) ("there is strong consensus which makes it appear clearly that the time is now here for broadscale federal regulation with provisions for *active state participation* to assure a much higher degree of railroad safety"); *accord* 49 U.S.C. § 20106 (allowing state regulation until a federal regulation governs the specific subject area).

Moreover, declaring this express intent for all railroad-safety areas did not (as *Consolidated Rail* opined) "modify" the BIA or SAA. It simply declared for the first time Congress's *express* pre-emptive intent for all railroad-safety areas, thereby negating the need to infer its intent – and thus negating interpretations of the earlier acts as implying a contrary intent to pre-empt the field and bar any state regulation.

Finally, the *Consolidated Rail* district court tried to bolster its legislative-history analysis by noting that Congress, in enacting the FRSA in 1970, did not then "repea[l]" the BIA or "recodif[y] or subsum[e] it within the comprehensive [FRSA]." *Consolidated Rail*, 536 F.Supp. at 656. But that reasoning is no longer valid. As noted above, in 1994 (after the 1982

Consolidated Rail order), Congress *did* "recodify" the BIA (and the SAA) and "subsume" their provisions into Congress's "comprehensive" statutory scheme for railroad "Safety": United States Code Title 49, Subtitle V, Part A ("Safety") (49 U.S.C. §§ 20101-21311). Hence, there now exists *one* federal regulatory scheme for railroad "Safety." And that "Safety" scheme, in its general provisions, contains Congress's express pre-emption provision (originally enacted in the 1970 FRSA) – which thus applies to the *entire* scheme.

2. *Policy*: Next, *Consolidated Rail*'s second stated "reason" to find continued implied pre-emption was that changing the pre-emption of locomotive-safety laws from universal field pre-emption to Congress's narrow express pre-emption would "run counter to Congress's purpose of uniform national regulation." *Consolidated Rail*, 536 F.Supp. at 656-657.

But this reasoning too lacks merit. The express "purpose" of Congress's comprehensive statutory scheme is not "uniform" regulation but railroad *safety*: "The *purpose* of this chapter is to promote *safety* in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101 (emphasis added). National uniformity of regulations is simply one means that can help achieve the ultimate "safety" purpose. But achieving uniformity cannot properly be pursued at the expense of railroad safety.

Moreover, Congress has determined that railroad safety is best achieved by *allowing* the states to "adopt" regulations "until" specific federal regulations pre-empt them. *See* 49 U.S.C. § 20106, subd. (a)(2) (App. 21-22); House Report at 4105 (AA 838) (comprehensive statutory scheme enacted as "broadscale federal legislation with provisions for active state participation").

In sum, the four states and federal circuits that continue to apply SAA and BIA field pre-emption despite Congress's express contrary intent rest on a district court decision that not only violates fundamental pre-emption analysis but is fundamentally flawed.[6]

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[6] Contrary to Griffin's contention below, the fact that *Consolidated Rail* was summarily affirmed does not suggest that this Court agrees that SAA and BIA field pre-emption survives. The Third Circuit "affirmed" the district court in an unpublished decision (696 F.2d 981), and this Court then summarily affirmed the Third Circuit (461 U.S. 912). But because the district court's order rested on alternative rulings of express pre-emption *and* field pre-emption, the reviewing courts' summary affirmances of the result do not indicate affirmance of the court's reasoning regarding continued field pre-emption. *See Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238 (1977) ("Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below. When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached.")

B. California's Holding of Continued Broad Field Pre-emption Defeats Congress's Scheme and Undermines Railroad Safety.

The holding of California (and Alabama and two circuits) does not simply run counter to Congress's express pre-emptive intent – it *undermines* Congress's express purpose of promoting railroad safety. *See* 49 U.S.C. § 20101 ("purpose" of statutory scheme is to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents").

As noted above, Congress in 1970 determined that its then-existing piecemeal statutory scheme, including the SAA and BIA, was not achieving railroad safety. Thus, Congress enacted a comprehensive scheme to cover "every area" of railroad safety. And Congress specifically determined that safety would best be promoted by allowing "active state *participation*," manifested in Congress's narrow express pre-emption provision that allows state regulation until a federal regulation is enacted.

But this specific, intended scheme of state participation is *gutted* if (as the California opinion below holds) the former SAA and BIA continue to imply pre-emption of any state regulation of the entire "fields" of "safety appliances" and "locomotives." Indeed, those sub-areas arguably comprise most of the overall field of railroad safety. Under the California holding, states cannot regulate (by laws or

tort claims) *anything* having to do with locomotives or train "safety" parts.

This leaves massive holes in Congress's safety scheme. Congress wants the states to fill those holes, regulating any railroad-safety area that lacks a governing federal regulation. But under the Opinion, states cannot participate in this intended way.

Moreover, this result does not just violate Congress's express intent, it violates Congress's purpose of railroad safety. Under the Opinion, train-part manufacturers like Griffin (brake shoes) are *immune* from liability for any defects in their products, without exception. Thus, those manufacturers can market defective parts without fear of liability.

This result actually encourages manufacturers to market defective products – or at a minimum not to worry whether their products are defective. Any manufacturer who is immune from liability for defects in its products has no incentive to eliminate such defects and thus will find it economically beneficial to cut corners and market products with defects, without fear of reprisal. Without question, allowing an unbridled flood of defective train products into the market undermines railroad safety.

C. Immunizing Culpable Product Manufacturers Via Broad Field Pre-emption Unfairly Places All Liability for Injuries to Railroad Workers on the *Railroads*.

This Court should settle this important pre-emption question also because immunizing culpable manufacturers of defective train products (as California and other jurisdictions do) unfairly saddles the American railroad industry with all liability for railroad-related injuries.

When a railroad employee is injured on the job, the Federal Employers' Liability Act ("FELA") allows the employee to bring a negligence action against the railroad employer *only*. *See* 45 U.S.C. § 51; *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 165-166, 123 S.Ct. 1210 (2003) ("Under the FELA, an employee who suffers an 'injury' caused 'in whole or in part' by a railroad's negligence may recover his or her full damages from the railroad, regardless of whether the injury was also caused 'in part' by the actions of a third party.").

But no such statutory remedy is authorized against anyone else, including any third-party manufacturers of products used on trains. Thus, the manufacturer is fully immune from liability – the employee cannot sue the manufacturer, and the railroad cannot seek indemnity from the manufacturer.

In cases with joint culpability, the railroads are unfairly being saddled with all liability. Continuing to apply broad field pre-emption hurts the railroads.

D. In Many Cases, Immunizing Culpable Third-Party Manufacturers Leaves the Injured Victim Without Any Recourse.

Finally, this pre-emption question should be settled by this Court now also because continuing to recognize broad field pre-emption deprives countless victims of railroad-related injuries of any recovery whatsoever.

Although injured railroad employees have a FELA cause of action against their employers, they still must prove railroad negligence. *See* 45 U.S.C. § 51; *Norfolk & Western*, 538 U.S. at 165-166. But in cases where the employee is injured by a defective *product*, often the railroad did not know that the product was defective and thus was not negligent. In such a case, the injured employee has no remedy against anyone.

Likewise, FELA does not provide any remedy to non-railroad-employees injured by train parts: *e.g.*, a passenger injured by a defective train part; a by-stander injured at a railroad yard; and a spouse of an injured employee. If these people are injured by a product defect, they should be able to recover from the product's manufacturer – but under California's holding of broad field pre-emption, the manufacturer is immune.

In sum, the pre-emption question raised in this case is critical to protecting not only American citizens injured by defective train parts but also the nation's railroads.

CONCLUSION

This Court should grant certiorari to settle this important question of federal pre-emption.

Respectfully submitted,

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing, or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ALVA RANSFORD et al., Plaintiffs and Appellants, v. GRIFFIN WHEEL COMPANY, INC., Defendant and Respondent.	A121620 (San Francisco County Super. Ct. No. CGC-07-274342) (Filed Jul. 9, 2009)

Plaintiff Alva Ransford is dying of mesothelioma he claims is caused by asbestos encountered in 39 years of repairing and replacing brakes on locomotives and rolling stock owned by the Union Pacific and Southern Pacific railroads. For 15 of those 39 years, plaintiff came into contact with a type of brake shoe containing asbestos that was manufactured by defendant Griffin Wheel Company, Inc. Joined by his

wife, Ora Myrtle Ransford, plaintiff filed a complaint for damages against Griffin in August 2007. The trial court granted Griffin's motion for summary judgment after concluding that "pursuant to the Locomotive Boiler Inspection Act and the Safety Appliances Act, the plaintiffs' causes of action are preempted" by these federal statutes. We affirm.

Notwithstanding its singular noun, the Locomotive Boiler Inspection Act (BIA) is actually a number of statutes passed by Congress that are now collected at title 49 United States Code Sections 20701-20703. The BIA gives the Secretary of Transportation authority over "the condition of every locomotive and tender and its parts and appurtenances." (49 U.S.C. § 20702(a).) There was no dissent when, in 1926, the United States Supreme Court, speaking through Justice Brandeis, held that the BIA "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." (*Napier v. Atlantic Coast Line* (1926) 272 U.S. 605, 611 (*Napier*).) Because Congress intended this power to be federally exclusive, "requirements by the states are precluded, however, commendable or however different their purpose." (*Id.* at p. 613.) In 2000, affirming a decision by this court, our Supreme Court held that the BIA precluded maintenance of state common law damage suits by former railroad workers against a locomotive manufacturer for personal injury allegedly caused by exposure to asbestos in the manufacturer's products. (*Scheiding v. General Motors Corp.* (2000)

22 Cal.4th 471, 474, cert. denied (2000) 531 U.S. 958 (*Scheiding*).)

The Safety Appliances Act (SAA) is also a number of statutes now codified at title 49 United States Code sections 20301-20306. The SAA has grown in scope and now governs "common carriers by railroad engaged in interstate commerce. The Act of 1893 applied only to vehicles used by them in moving interstate traffic. [Citation.] Its requirements were by the Act of 1903 extended to all their vehicles. [Citation.] So far as the safety equipment of such vehicles is concerned, these Acts operate to exclude state regulation, whether consistent, complimentary, additional or otherwise." (*Gilvary v. Cuyahoga Valley Ry.* (1934) 292 U.S. 57, 60-61.) In 1999 our Supreme Court held that the SAA preempted state common law claims for defective design of safety equipment on railway rolling stock. (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1160, cert. denied, *sub. nom.* (2000) 528 U.S.. 1077 (*Carrillo*).)

Brakes on railroad cars clearly qualify under the BIA as an "appurtenant" to those cars, and as "safety equipment" under the SAA.[1] Thus, after *Scheiding*

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[1] We confess to some surprise at plaintiffs' argument that the brake shoes manufactured by Griffin do not qualify as a "safety appliance" within the meaning of the SAA. If the means of stopping thousands of tons of train does not qualify as a safety appliance, we would be hard pressed to imagine what would. Plaintiffs' argument is based on statutory language, in that "The SAA lists specific safety equipment to be used on rail cars, including automatic couplers, secure sill steps, efficient *hand*

(Continued on following page)

and *Carrillo*, this appeal might appear to call for a routine application of the familiar principle of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455: "Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . The decisions of this court are binding upon and must be followed by all the state courts of California." It was so treated last year by Division Four of this district, in a case brought by the same counsel who represent plaintiffs here. That case is *Frastaci v. Vapor Corp.* (2007) 158 Cal.App.4th 1389 (*Frastaci*), which held that state common law tort claims against a locomotive manufacturer alleging that former railroad repairman died of mesothelioma caused by exposure to asbestos in locomotives during

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brakes, secure ladders, running boards, handholds, grab irons, drawbars, and power brakes sufficient to stop the train. (49 U.S.C. § 20302(a).)" Even on this limited front, plaintiffs' argument must fail because the SAA specifies that "enough of the vehicles on the train" must have "power or train brakes so that the engineer on the locomotive . . . can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose." (*Id.* § 20302(a)(5)(A).) Thus, notwithstanding plaintiffs' emphasis on hand brakes, it is clear beyond doubt that Congress intended the SAA to include the major, primary system for controlling train speed. Moreover, plaintiffs pay no attention to the BIA's "appurtenant" language, which would seem more than broad enough to cover brakes that are not hand held. The Secretary of Transportation certainly thought so when promulgating numerous regulations governing railroad brakes, citing the SAA as among the statutes authorizing such regulations. (See 49 C.F.R. §§ 232.1-232.505, 238.1-238.603.)

repair and maintenance are preempted by BIA as interpreted in *Scheiding*. Our Supreme Court denied review.

Despite that, plaintiffs advance a series of novel arguments to avoid that conclusion.

Plaintiffs first assert that "implied field preemption under the SAA and BIA *no longer exists*" because "Congress in 1970 passed a new, comprehensive act to govern *all* areas of railroad safety – including the subcategories that had been governed by the SAA (rail-car appliances) and the BIA (locomotives). This new act, the Federal Railroad Safety Act (FRSA), *expressly* applies to *all railroad-safety areas* – thus including rail-car appliances and locomotives. And the FRSA contains an *express* preemption provision, which preempts *only* those state laws addressing a subject matter on which federal regulations exist."[2]

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[2] The particular language upon which plaintiffs rely – and which we have italicized – is in a provision that currently reads: "A State may adopt or continue in force a law, regulation, or order relating to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters) prescribes a regulation or issues an order covering the subject matter of the State requirement. *A state may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security* when the law, regulation, or order – [¶] (A) is necessary to eliminate or reduce an essentially local safety or security hazard; [¶] (B) is not incompatible with a law, regulation, or order of the United States Government; and [¶] (C) does not unreasonably burden interstate commerce." (49 U.S.C. § 20106(a)(2), italics added.)

(Continued on following page)

"[B]ecause *Carrillo* and *Scheiding* did not consider the effect of the FRSA's express preemption provision, they do not stand for the proposition that former SAA and BIA field preemption still exists despite Congress's express, contrary intent in the FRSA. And thus *Carrillo* and *Scheiding* do not prevent this Court from considering the issue for the first time in California."

To hear plaintiffs frame the issues, one might conclude that the SAA and BIA had been repealed when Congress enacted the FRSA (49 U.S.C. §§ 20106-20167). However, Congress did no such thing, as was expressly noted in *Scheiding*: "[W]hen Congress enacted the Federal Railroad Safety Act in 1970, it specifically identified the BIA [and the SAA] as among the 'particular laws' governing railroad safety that 'have served well,' so well that the Committee on Interstate and Foreign Commerce reviewing the matter 'chose to continue them without change.' (H.R. Rep. No. 91-1194, 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4105.) . . . Additionally, when Congress recodified the BIA in 1994, the House Report stated 'this bill makes no substantive change' and disclaimed any intent to

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Notwithstanding the literal language about a state's "law, regulation or order," it is accepted that federal preemption also extends to state common law tort causes of action. (E.g., *CSX Transp., Inc. v. Easterwood* (1993) 507 U.S. 658, 664; *Scheiding, supra*, 22 Cal.4th 471, 476-477 & fn. 3, 480; *Carrillo, supra*, 20 Cal.4th 1158, 1162.) Plaintiffs do not contend otherwise.

'impair the precedent value of earlier judicial decisions. . . .' (H.R. Rep. No. 103-180, 1st. Sess. (1993) reprinted in 1994 U.S. Code Cong. & Admin. News, p. 822.)"[3] (*Scheiding, supra*, 22 Cal.4th 471, 478.)

Noting the same 1970 committee report, the *Carrillo* court stated: "Because Congress continued

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[3] The 1970 committee report also stated: "The first of the Safety Appliance Acts dates back to 1893 . . . and the Locomotive Inspection Act to 1911. These and other rail safety statutes have been reasonably effective in their respective areas. They were enacted to protect employees against particular hazards and the enforcement of their provisions over the years has saved lives." (H.R. Rep. No. 91-1194, *supra*, reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4106.) At a later point in its report, the committee reiterated its "intent that those existing statutes will continue to be enforced . . . in their respective areas. . . . In other words, it is the intent of the committee that the existing statutes continue to be administered and enforced *as if this legislation had not been enacted*. . . . It is the desire of the committee . . . that the Department [of Transportation] makes its best effort to carry out the new statute *in concert with the existing regulatory framework*." (*Id.* at p. 4114, italics added.) The 1994 "House report" – actually from the Committee on the Judiciary – stated that the purpose of the measure was to "revise, codify, and enact *without substantive change* certain general and permanent laws relating to transportation." (H.R. Rep. No. 103-180, *supra*, reprinted in 1994 U.S. Code Cong. & Admin. News, p. 818, italics added.) In the 648 pages in the United States Code Congressional and Administrative News devoted to the subject of the bill – "Revision of Title 49, U.S.C." – there is only a single brief reference to section 20106, which does not even mention the "clarification" upon which plaintiffs' place so much emphasis. (See *id.* at p. 898.)

The SAA was also recodified in the same 1994 enactment that recodified the BIA. (Pub. Law 103-272 (July 5, 1994) 108 Stat. 745.)

the SAA intact and unmodified within its historic regulatory area, our conclusion as to its preemptive effect is not affected by passage of the FRSA. Since the SAA preempts plaintiff's tort claim, we have no occasion to consider whether the FRSA does also." (*Carrillo, supra*, 20 Cal.4th 1158, 1169, fn. 3.) It is therefore clear beyond any reasonable doubt that both the SAA and the BIA continue to have an existence and potency that is completely independent of the FRSA[4] – a reality recognized by our Supreme Court in *Scheiding* and in *Carrillo*.

Plaintiffs point to two old decisions by the Supreme Courts of Washington and Pennsylvania in support of their contention that the SAA and the BIA were effectively nullified by passage of the FRSA. *State v. Chicago, Milwaukee, St. Paul & Pacific R. Co.* (Wash. 1971) 484 P.2d 1146; *Norfolk & W. Ry. Co. v. Pa. Public Utility* (Pa. 1980) 413 A.2d 1037. Neither case has been followed by any other; indeed, the only reported decision to consider both of these state authorities peremptorily rejected them as marking a

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[4] This conclusion defeats plaintiffs' corollary argument that there is no preemption because there is no specific federal regulation governing asbestos brake shoes on locomotives and rolling stock. On this point we note that the FRSA preemption provision upon which plaintiffs rely prohibits state input if it unreasonably burdens interstate commerce (49 U.S.C. § 20106(a)(2) quoted at fn. 2, *ante*), and our Supreme Court in *Scheiding* endorsed our conclusion that imposing state tort liability for asbestos-related damages would have such a consequence. (*Scheiding, supra*, 22 Cal.4th 471, 476-477.)

sea change in federal policy. (See *Missouri Pacific R. Co. v. Railroad Comm'n of Texas* (5th Cir. 1987) 833 F.2d 570, 576, fn. 7)[5]

Moreover, the Pennsylvania decision cited by plaintiffs was not followed by a Pennsylvania federal district court, a decision affirmed by the United States Supreme Court: *Consol. Rail Corp. v. Pennsylvania Pub. Util.* (E.D.Pa. 1982) 536 F.Supp. 653, affirmed (3d Cir. 1982) 696 F.2d 981, affirmed *sub nom. Pennsylvania Public Utility Commission et al. v. Consolidated Rail Corporation* (1983) 461 U.S. 912 (*Consolidated Rail*).) *Consolidated Rail* was discussed at length in *Scheiding*, the Supreme Court noting that in it the state of Pennsylvania contended that when Congress enacted the FRSA, it "'redistributed railroad regulatory authority so that the total-preemption test of the [BIA] is no longer valid.' [Citation.] The district court rejected the state's argument and found *Napier* controlling." (*Scheiding, supra*, 22 Cal.4th 471, 477.) And, the *Scheiding* court observed, the United States Supreme Court's summary affirmance "'should . . . be understood as . . . applying principles established by prior decisions to the particular facts involved.' [Citation.] We thus have strong, if indirect evidence *Napier* continues to

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[5] Respondent filed a request seeking judicial notice of other decisions from foreign states and other items, which request was opposed in part by appellants. Respondent's request is granted as to items numbered 3, 4, 5, and 6, and denied as to the balance.

control with respect to the scope of BIA preemption." (*Id.* at p. 478.)

Whatever the precise holding of the Pennsylvania district court – a point much discussed at oral argument – the bottom line is that the end result of that litigation has been construed by our Supreme Court, and we are bound by that construction. Thus, whatever persuasive impact the Washington and Pennsylvania state court decisions might otherwise offer – and we can discern none – our own state Supreme Court's contrary decisions in *Carrillo* and *Scheiding* foreclose the issue for us. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d 450, 455.) Plaintiffs' initial argument must be rejected.

Plaintiffs also see significance in the fact that in 2007, after *Carrillo* and *Scheiding*, Congress reenacted the FRSA with the following language added to the preemptive language quoted at footnote 2, *ante*: "Clarification regarding State law causes of action. – (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party –

"(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

"(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

"(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2)." (49 U.S.C. § 20106(b).)

Plaintiffs argue that because this "clarification" involves language not considered in either *Carrillo* or *Scheiding,* we are no longer bound to follow these decisions. But plaintiffs assume a predicate – that the FRSA displaces either the SAA or the BIA – which has already been shown to be inapplicable. To accede to plaintiffs' argument would require us to conclude that Congress intended with this "clarification" to repeal by implication both the SAA and the BIA, something expressly denied. (See fn. 2 and accompanying text, *ante*.)

Plaintiffs see *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51 (*Sprietsma*), as effecting a sea change in federal preemption analysis. We do not. *Sprietsma* involved neither the SAA nor the BIA, but the Federal Boat Safety Act (46 U.S.C. §§ 4301-4311). The United States Supreme Court held that a state tort action was neither expressly nor impliedly preempted by that measure. However, it seems clear that the reason the court acted was to resolve an extensive conflict in lower courts on the preemption issues. (See *Sprietsma, supra,* at p. 55 & fn. 3.) Nothing in the opinion hints at the fundamental shift in preemption

analysis that plaintiffs discern. Moreover, plaintiffs can muster no authority recognizing that such a doctrinal shift occurred. For present purposes, *Sprietsma* is relevant only to the extent the Court held that the "structure and framework" of the federal act "do not convey a 'clear and manifest' intent" to preempt any supplementary efforts by state law. (*Id.* at pp. 69-70.) As already shown, the court concluded otherwise with respect to the SAA and the BIA.

In a similar vein, plaintiffs' argue that in *Terminal Assn. v. Trainmen* (1943) 318 U.S. 1, the United States Supreme Court "pulled back" from its earlier holdings about the preemptive impacts of federal railway laws. Our own Supreme Court rejected a similar argument in *Carrillo, supra*, 20 Cal.4th 1158, 1166. We also think it significant that the United States Supreme Court declined to review either *Carrillo* or *Scheiding*, and that in the more than 50 years after *Terminal Assn.* there is no authority plaintiffs have cited acknowledging the reading they attribute to that decision.[6]

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[6] Subsequent to the filing of their reply brief, plaintiffs advised us by letter that they "inadvertently omit[ted] reference" to *Wyeth v. Levine* (2009) ___ U.S. ___, [129 S.Ct. 1187], but they do not otherwise discuss the relevance or application of *Wyeth* to this appeal. We have examined *Wyeth* – where the United States Supreme Court found that a state tort action for inadequate warning of a drug was not preempted by reason of the Food and Drug Administration's authority over drug labeling – and found nothing which alters our analysis.

Plaintiffs' second argument is that the SAA and the BIA confer immunity only when the train is actually "in use," but not the downtime when it is being repaired or refitted with new brakes. Counsel for plaintiffs candidly acknowledge that this argument was rejected by Division Four when he presented it in *Frastaci*, but he re-presents it in the hope we will reach a different result. Division Four reasoned that "Scant authority discussing the 'in use' limitation vis-à-vis the preemptive scope of the BIA exists. What authority does exist suggests that the 'in use' limitation is immaterial to a BIA preemption analysis." (*Frastaci, supra,* 158 Cal.App.4th 1389, 1399.) After reviewing that authority, the court concluded: "The preemptive scope of the BIA 'extends to the design, the construction and the material of every part of the locomotive and tender and of all its appurtenances.' (*Napier, supra*, 272 U.S. at p. 611.) There is no indication Congress intended the BIA's broad preemptive scope to be circumscribed by the location of the locomotive. Rather, the BIA is directed at the *subject* of the locomotive equipment, which is 'peculiarly one that calls for uniform law. . . .' (*Penna. R.R. Co. v. Pub Service Comm.* (1919) 250 U.S. 566, 569); see also *Napier, supra*, 272 U.S. at p. 612.)" (*Id.* at p. 1402.) We agree with this reasoning.

The summary judgment is affirmed.

Richman, J.

We concur:

Kline, P.J.

Haerle, J.

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Attorneys for Defendant GRIFFIN WHEEL COMPANY, INC., erroneously sued herein as Griffin Wheel Corporation

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

ALVA RANSFORD and ORA MYRTLE RANSFORD, Plaintiffs, vs. AC AND S, INC., et al., Defendants.	Case No. CGC-07-274342 **~~[PROPOSED]~~ ORDER GRANTING DEFENDANT GRIFFIN WHEEL COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT [C.C.P. § 437c]** **Date: February 29, 2008** **Time: 9:30 a.m.** **Dept.: 302** **Judge: Hon. Patrick J. Mahoney** **Trial Date: March 10, 2008**

The Motion for Summary Judgment of defendant GRIFFIN WHEEL COMPANY, INC. came on regularly for hearing at the above date and time before this court in Department 302, attorney Stephen Tigerman appearing for plaintiffs ALVA RANSFORD and MYRTLE RANSFORD and attorney Larry Ottaway appearing for defendant GRIFFIN WHEEL COMPANY, INC.

After considering the supporting and opposition papers of both sides and the argument of counsel, the Court ruled that pursuant the Locomotive Boiler Inspection Act and the Safety Appliances Act, the plaintiffs causes of action are preempted. The court granted GRIFFIN WHEEL COMPANY, INC.'s Motion for Summary Judgment.

IT IS HEREBY ORDERED that defendant GRIFFIN WHEEL COMPANY, INC.'s Motion for, Summary Judgment is granted.

Dated: FEB 29 2008

PATRICK J. MAHONEY
JUDGE OF THE
SUPERIOR COURT

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IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

ALVA RANSFORD and ORA MYRTLE RANSFORD, Plaintiffs, vs. AC AND S, INC., et al., Defendants.	Case No. CGC-07-274342 **JUDGMENT BY COURT UNDER C.C.P. § 437c** Date: March 12, 2008 Time: 11:00 a.m. Dept.: 302

This court, having on February 29, 2008, granted the motion for summary judgment by Griffin Wheel Company, Inc., a copy of which is attached as Exhibit "A", and having ordered entry of judgment as requested in said motion.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs ALVA RANSFORD and ORA MYRTLE

RANSFORD shall take nothing, and that defendant GRIFFIN WHEEL COMPANY, INC. shall recover from said plaintiffs costs of suit pursuant to its cost bill.

Dated: MAR 12 2008

PATRICK J. MAHONEY
JUDGE OF THE
SUPERIOR COURT

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 2

ALVA RANSFORD et al.,
Plaintiffs and Appellants,
v.
AC AND S, INC., et al.
Defendants and Respondents.

A121620
San Francisco County No. 274342

(Filed Jul 30, 2009)

BY THE COURT:

Appellants' petition for rehearing is denied.

Date: JUL 30 2009 KLINE, P.J. P.J.

Court of Appeal, First Appellate District,
Division Two – No. A121620

S175613

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ALVA RANSFORD et al.,
Plaintiffs and Appellants,

v.

GRIFFIN WHEEL COMPANY, INC. et al.,
Defendants and Respondents.

(Filed Sep 23, 2009)

The petition for review is denied.

Werdegar, J., was absent and did not participate.

GEORGE
Chief Justice

STATUTES INVOLVED IN THE CASE

The following statutes involved in this case are all from Congress's statutory scheme from railroad safety: United States Codes, Title 49 ("Transportation"), Subtitle V ("Rail Programs"), Part A ("Safety"):

From Chapter 201: "General"

49 U.S.C. § 20101 – "Purpose":

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

49 U.S.C. § 20106 – "Preemption":

(a) *National uniformity of regulation.*

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to

railroad safety or security when the law, regulation, or order

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) *Clarification regarding State law causes of action.*

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) *Jurisdiction.*

Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

From Chapter 203: "Safety Appliances"

49 U.S.C. § 20301 – "Definition and Non-application":

(a) **Definition.** – In this chapter, "vehicle" means a car, locomotive, tender, or similar vehicle.

(b) **Nonapplication.** – This chapter does not apply to the following:

(1) a train of 4-wheel coal cars.

(2) a train of 8-wheel standard logging cars if the height of each car from the top of the rail to the center of the coupling is not more than 25 inches.

(3) a locomotive used in hauling a train referred to in clause (2) of this subsection when the locomotive and cars of the train are used only to transport logs.

(4) a car, locomotive, or train used on a street railway.

49 U.S.C. § 20302 – "General Requirements":

(a) **General.** – Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines –

(1) a vehicle only if it is equipped with –

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if –

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

(b) **Refusal To Receive Vehicles Not Properly Equipped.** – A railroad carrier complying with subsection (a)(5)(A) of this section may refuse to receive from a railroad line of a connecting railroad carrier or a shipper a vehicle that is not equipped with power or train brakes that will work and readily interchange with the power or train brakes in use on the vehicles of the complying railroad carrier.

(c) **Combined Vehicles Loading and Hauling Long Commodities.** – Notwithstanding subsection (a)(1)(B) of this section, when vehicles are combined to load and haul long commodities, only one of the vehicles must have hand brakes during the loading and hauling.

(d) **Authority To Change Requirements.** – The Secretary may –

(1) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety appliances required by subsection (a)(1)(B) and (C) and (2) of this section only for good cause and after providing an opportunity for a full hearing;

(2) amend regulations for installing, inspecting, maintaining, and repairing power and train brakes only for the purpose of achieving safety; and

(3) increase, after an opportunity for a full hearing, the minimum percentage of vehicles in a train that are required by subsection (a)(5)(B) of this section to be equipped and used with power or train brakes.

(e) **Services of Association of American Railroads.** – In carrying out subsection (d)(2) and (3) of this section, the Secretary may use the services of the Association of American Railroads.

49 U.S.C. § 20303 – "Moving Defective and Insecure Vehicles Needing Repairs":

(a) **General.** – A vehicle that is equipped in compliance with this chapter whose equipment becomes defective or insecure nevertheless may be moved when necessary to make repairs, without a penalty being imposed under section 21302 of this title, from the place at which the defect or insecurity was first discovered to the nearest available place at which the repairs can be made –

(1) on the railroad line on which the defect or insecurity was discovered; or

(2) at the option of a connecting railroad carrier, on the railroad line of the connecting carrier, if not farther than the place of repair described in clause (1) of this subsection.

(b) **Use of Chains Instead of Drawbars.** – A vehicle in a revenue train or in association with commercially-used vehicles may be moved under this section with chains instead of drawbars only when the vehicle contains livestock or perishable freight.

(c) **Liability.** – The movement of a vehicle under this section is at the risk only of the railroad carrier doing the moving. This section does not relieve a carrier from liability in a proceeding to recover damages for death or injury of a railroad employee arising from the movement of a vehicle with equipment that is defective, insecure, or not maintained in compliance with this chapter.

49 U.S.C. § 20304 – "Assumption of Risk By Employees":

An employee of a railroad carrier injured by a vehicle or train used in violation of section 20302(a)(1)(A), (2), (4), or (5)(A) of this title does not assume the risk of injury resulting from the violation, even if the employee continues to be employed by the carrier after learning of the violation.

49 U.S.C. § 20305 – "Inspection of Mail Cars":

The Secretary of Transportation shall inspect the construction, adaptability, design, and condition of

mail cars used on railroads in the United States. The Secretary shall make a report on the inspection and submit a copy of the report to the United States Postal Service.

49 U.S.C. § 20306 – "Exemption for Technological Improvements":

(a) **General.** – Subject to subsection (b) of this section, the Secretary of Transportation may exempt from the requirements of this chapter railroad equipment or equipment that will be operated on rails, when those requirements preclude the development or implementation of more efficient railroad transportation equipment or other transportation innovations under existing law.

(b) **Conditions for Exemption.** – The Secretary may grant an exemption under subsection (a) of this section only on the basis of –

(1) findings based on evidence developed at a hearing; or

(2) an agreement between national railroad labor representatives and the developer of the new equipment or technology.

From Chapter 207: "Locomotives"

49 U.S.C. § 20701 – "Requirements for Use":

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when

the locomotive or tender and its parts and appurtenances –

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. § 20702 – "Inspection, Repairs, and Inspection and Repair Reports":

(a) **General.** – The Secretary of Transportation shall –

(1) become familiar, so far as practicable, with the condition of every locomotive and tender and its parts and appurtenances;

(2) inspect every locomotive and tender and its parts and appurtenances as necessary to carry out this chapter, but not necessarily at stated times or at regular intervals; and

(3) ensure that every railroad carrier makes inspections of locomotives and tenders and their parts and appurtenances as required by regulations prescribed by the Secretary and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is used again.

(b) **Noncomplying Locomotives, Tenders, and Parts.** –

(1) When the Secretary finds that a locomotive, tender, or locomotive or tender part or appurtenance owned or operated by a railroad carrier does not comply with this chapter or a regulation prescribed under this chapter, the Secretary shall give the carrier written notice describing any defect resulting in noncompliance. Not later than 5 days after receiving the notice of noncompliance, the carrier may submit a written request for a reinspection. On receiving the request, the Secretary shall provide for the reinspection by an officer or employee of the Department of Transportation who did not make the original inspection. The reinspection shall be made not later than 15 days after the date the Secretary gives the notice of noncompliance.

(2) Immediately after the reinspection is completed, the Secretary shall give written notice to the railroad carrier stating whether the locomotive, tender, part, or appurtenance is in compliance. If the original finding of noncompliance is sustained, the carrier has 30 days after receipt of the notice to file an appeal with the Secretary. If the carrier files an appeal, the Secretary, after providing an opportunity for a proceeding, may revise or set aside the finding of noncompliance.

(3) A locomotive, tender, part, or appurtenance found not in compliance under this subsection may be used only after it is –

(A) repaired to comply with this chapter and regulations prescribed under this chapter; or

(B) found on reinspection or appeal to be in compliance.

(c) **Reports.** – A railroad carrier shall make and keep, in the way the Secretary prescribes by regulation, a report of every –

(1) inspection made under regulations prescribed by the Secretary; and

(2) repair made of a defect disclosed by such an inspection.

(d) **Changes in Inspection Procedures.** – A railroad carrier may change a rule or instruction of the carrier governing the inspection by the carrier of the locomotives and tenders and locomotive and tender parts and appurtenances of the carrier when the Secretary approves a request filed by the carrier to make the change.

49 U.S.C. § 20703 – "Accident Reports and Investigations":

(a) **Accident Reports and Scene Preservation.** – When the failure of a locomotive, tender, or locomotive or tender part or appurtenance results in an accident or incident causing serious personal injury or death, the railroad carrier owning or operating the locomotive or tender –

(1) immediately shall file with the Secretary of Transportation a written statement of the fact of the accident or incident; and

(2) when the locomotive is disabled to the extent it cannot be operated under its own power, shall preserve intact all parts affected by the accident or incident, if possible without interfering with traffic, until an investigation of the accident or incident is completed.

(b) **Investigations.** – The Secretary shall –

(1) investigate each accident and incident reported under subsection (a) of this section;

(2) inspect each part affected by the accident or incident; and

(3) make a complete and detailed report on the cause of the accident or incident,

(c) **Publication and Use of Investigation Reports.** – When the Secretary considers publication to be in the public interest, the Secretary may publish a report of an investigation made under this section, stating the cause of the accident or incident and making appropriate recommendations. No part of a report may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.